AMELIA K. BLASTERVOLD ET AL.

IBLA 75-628, 629 Decided January 6, 1976

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting in part Alaska Native allotment application F-19002.

Vacated, remanded for investigation.

1. Alaska: Native Allotments

   An allotment may be granted only when the Native applicant demonstrates actual substantial use and occupation of the land at least potentially exclusive of others, and not merely intermittent use.

2. Alaska: Native Allotments--Rules of Practice: Evidence--Rules of Practice: Hearings

   A Native allotment applicant is not entitled to a hearing as a matter of right inasmuch as the issuance of an allotment is discretionary with the Secretary of the Interior. However, where there does appear to be a dispute as to material facts raised by conflicting affidavits as to the alleged use of land by conflicting applicants, a further field investigation will be directed in an attempt to resolve the factual uncertainties.

APPEARANCES: John D. Van Winkle, Esq., of Larson, Timbers and Van Winkle for appellant; James Brelsford, of Alaska Legal Services Corp., for Rosaline Hasway Jackson, respondent.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Amelia K. Blastervold has appealed from a decision of the Alaska State Office, Bureau of Land Management, dated April 28, 1975, which rejected in part her Native allotment application (F-19002) filed pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), and the pertinent regulations in 43 CFR Subpart 2561.

Appellant originally filed her application January 12, 1971, for three parcels of land (Parcels A, B, and C) along the Kobuk River near Kiana, Alaska, totalling approximately 160 acres. 1/ She alleged in her application that she had used these three tracts to hunt, fish, berrypick and camp for a period from 1955 to the date of application. She claimed an improvement of a 9x12 cabin valued at $2,500.

The record shows that appellant met with a BLM field examiner in August of 1972 and June of 1973 to inspect the three parcels. Parcel "B" is located approximately 15 miles up the Kobuk River from Kiano. On Parcel "B" there was a 9x12 cabin and a small outbuilding. The examiner found berries and some timber on this parcel. He concluded that the applicant had exclusively used this 80 acres for hunting, trapping, berrypicking and fishing to qualify for an allotment. On Parcel "C", which is located approximately 2 miles north of Parcel "B", the examiner found no improvements and no evidence of the applicant's exclusive use. However, the applicant claimed this parcel as a berrypicking site, and the examiner did find berries and big game browse on the site. He concluded that the applicant's use of this 40 acres for berrypicking in conjunction with her main camp qualified for an allotment. The Bureau therefore approved these two parcels for allowance.

The third parcel, Parcel "A," is located approximately 6 miles south of Parcel "B" on the north bank of the Kobuk River. The examiner found no improvements on this parcel. An on-the-ground examination, as the applicant had it staked and marked, revealed that the parcel was not located as shown on the original application. The actual location of this 40 acres was further down river and was in direct conflict with the Native Allotment Application of Rosaline Jackson (F-17977). The examiner found that appellant's

1/ These three parcels are described as follows:

Parcel A: S 1/2 NE 1/4 NW 1/4; frac. N 1/2 SE 1/4 NW 1/4 Sec. 11, T. 18 N., R. 7 W., KRM. Selawik D-3.

Parcel B: Frac. S 1/2 NE 1/4 frac. N 1/2 NW 1/4 SE 1/4 Sec. 33, T. 19 N., R. 6 W., KRM. Baird Mtns. A-2.

Parcel C: Frac. NE 1/4 NW 1/4; N 1/2 N 1/2 SE 1/4 NW 1/4 Sec. 3 T. 18 N., R. 6W., KRM. BLM Selawik K3/18.

alleged use of this parcel for cutting cabin logs was insufficient for an allotment and that her use was predated by the alleged use of the conflicting applicant. In addition the examiner reported that Mrs. Blastervold had stated that she knew this parcel belonged to Rosaline Jackson.

On May 29, 1974, the BLM notified appellant that her application for Parcel A would be rejected. She was allowed 30 days in which to submit any further evidence in support of her claim. Appellant responded with a letter of June 15, 1974, contesting the field examiner's conclusion and requesting a further examination of the claim. Appellant again responded October 21, 1974, asking for further joint examination of Parcel A with the conflicting applicant. The Bureau, determining that appellant had submitted no further evidence, issued its decision rejecting the application for Parcel A.

Appellant contends in her appeal that the factual conclusions based on the field examination are in error. She contends she is not in conflict with Rosaline Jackson and the Bureau failed to fully examine the claim to find "(a) a path etched in the bank which allows access to higher ground on Parcel A, (b) the saw frame used to cut wood, (c) a fireplace, (d) a tent pad, (e) a winter brush trail, and (f) a trap cache." Appellant requests either a further field examination or a hearing to clarify factual disputes involving the extent of her use, the location of the claim and the duration of her use as to whether it predates her occupancy originally claimed in the application from 1955. She denies that she has admitted the applied-for land belongs to Rosaline Jackson.

In support of her claim appellant has submitted several affidavits of witnesses to attest that she has used the land applied for as specified in her appeal.

Rosaline Hasway Jackson has responded to the statements on appeal with contentions which in many instances directly contradict appellant's claims. She also has submitted several affidavits attesting to her use of Parcel A as a summer fish camp. She requests in the alternative that the case be remanded to the Bureau for a more complete investigation of whether a conflict does, in fact, exist on the ground.

From our review of the record, we can only conclude that neither party in this case, to this point, has established that she has satisfied the use and occupancy requirement of the Allotment Act for this 40-acre parcel.

[1] The Allotment Act requires an applicant to make satisfactory proof of "substantially continuous use and occupancy of

the land for a period of five years." The regulations, 43 CFR 2561.0-5(a), defines--

> The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

And, the burden to present clear and credible evidence to establish entitlement is upon the applicant. Maxie Wassillie, 17 IBLA 416 (1974); John Nanalook, 17 IBLA 353 (1974).

There are factual disputes rampant throughout the record. It is uncertain which party, if either, has used Parcel A as required by the law, whether both parties have used the land nonexclusively, what improvements may be found on the parcel from a more extensive field investigation, and which party's witnesses are credible under the circumstances.

The Bureau's rather limited field report is of little help in resolving these conflicts. The Bureau, however, was ready to approve a full 160-acre allotment including the area of Parcel A to Rosaline Jackson on the strength of this examination. The corresponding field report, dated January 9, 1973, within the conflicting case F-17977, states:

> Conflicts
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> There appeared to be a conflict with another individual, however they got together and agreed that Mrs. Jackson had exclusive use of the property. It was brought out during this discussion that the other party had only cut logs on the area, without the proper permit.

From all other representations in the record and on appeal this obviously is not the case. Neither party has admitted the exclusive use of the other. Therefore, approval, at least as to parcel A, cannot be granted until this question is ultimately determined. 2/

2/ If both parties are determined to have used the same land nonexclusively, neither qualifies for an allotment under the terms of the regulations in 43 CFR 2561.0-5(a).

Further, there is no discussion in the record of how Rosaline Jackson may have specifically used and occupied Parcel A within the confines of her total allotment. The only reference to Jackson's improvements is that she has a campsite and cache on the allotment, although not on the 40 acres claimed by Blasterwold.

It should be here noted that as to each party the record before us is sparse as to substantial evidence of use of this 40 acre site away from her main bases of operation.

The record indicates that as of July 1974, during adjudication of these allotments, Bureau personnel determined that a supplementary field report was warranted to resolve contradictory statements. 3/ Appellant has also indicated that a second field examiner came to Kiana to examine her claim, but no examination took place because Mrs. Jackson could not or would not go out to the claim. The record is unclear on this development and there is no explanation of why further examination was not made.

[2] It is well settled that a Native allotment applicant is not entitled to a hearing as a matter of right inasmuch as the issuance of an allotment is discretionary with the Secretary of the Interior. Beulah Moses, 21 IBLA 157 (1975); Ann McNoise, 20 IBLA 169 (1975). The decision to hold hearings, if there are disputed facts, is also within the Secretary's discretion. Pence v. Morton, Civ. No. A-74-138 (D. Alaska, April 8, 1975); appeal pending. Appellant has in this case made allegations of use and occupancy that if established may warrant a different conclusion. Both appellant and Mrs. Jackson have expressed their desire for a more complete development of the record by a through field examination. It is our view that there is sufficient uncertainty in the record as to material facts to require such further field investigation. If the investigation does not produce evidence sufficient to resolve the dispute, it may then be necessary to hold a hearing.

3/ The file for F-19002 contain a memorandum to the District Manager 7/2/74 requesting a supplemental field report because of statements contradictory of the first field report.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case remanded to the Bureau of Land Management for a further investigation to resolve the conflicts raised herein.

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Martin Ritvo
Administrative Judge

I concur:

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Douglas Henriques
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING IN PART AND DISSENTING IN PART.

I agree with the legal principles enunciated in the main opinion, but dissent from that portion of the decision remanding the case for a further field examination.

The issues requiring resolution embrace:

(1) Does the land claimed by appellant and respondent conflict, and if so, to what extent?

(2) Has either party, or both, used or occupied the land in conflict, and if so, to what extent, both timewise and what is the nature of use and occupancy?

(3) What are their respective priorities?

(4) Has the land been used or occupied by either claimant in a manner "potentially exclusive of others" [43 CFR 2561.0-5]?

The witnesses' affidavits, furnished by appellant and respondent are almost diametrically inconsistent. In the circumstances, I believe that another field examination would not resolve all the issues in this case.

I fully recognize that a Native allotment applicant has no right to a hearing and that it has been so held on many occasions. Pence v. Morton, A-74-138, D. Alaska (April 8, 1975), appeal pending; Heldina Eluska, 21 IBLA 292 (1975); Gregory Anelon, Sr., 21 IBLA 230 (1975); William Carlo, Sr., 21 IBLA 181 (1975); Beulah Moses, 21 IBLA 157 (1975).

Concededly, a field examination might resolve the issue whether the situs of each claim conflicts with the other. However, in the face of the conflicting affidavits, it appears to me that only a hearing would serve to resolve all the conflicts of testimony and the other issues. My belief that a hearing would be appropriate here should not be construed as deprecating our earlier holdings on the question of hearings in Native allotment cases.

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Frederick Fishman
Administrative Judge